

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

|                             |   |                     |
|-----------------------------|---|---------------------|
| Federal-State Joint Board   | ) |                     |
| On Universal Service Seeks  | ) |                     |
| Comment on Certain of the   | ) |                     |
| Commission's Rules Relating | ) | CC Docket No. 96-45 |
| To High-Cost Universal      | ) |                     |
| Service Support and the ETC | ) |                     |
| Designation Process         | ) |                     |

COMMENTS OF THE  
WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

## **SUMMARY**

The comments of the Washington Telephone Association (WITA) address the Scope of Support and Process for Designating ETCs.

As a preliminary matter, WITA's comments support the white paper published by the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) entitled "Universal Service in America: A Congressional Mandate at Risk." WITA also points out that access line growth for rural companies is flat or even declining, which increases the challenges of meeting Universal Service mandates in rural areas.

On the Scope of Support, WITA advocates that support continue to be provided for all lines. The administrative problems associated with using a "primary line only" basis for distributing USF support are problematical. Further, there is a question whether converting to a primary line support concept would actually result in a savings to the Universal Service Fund. There is also an issue whether removing the support from secondary lines would be contrary to 47 USC § 254.

WITA suggests that the Scope of Support be addressed by focusing on the use of billing addresses for wireless ETCs. WITA points out some of the many problems that are

inherent in using billing addresses, including illustrations from the experience of US Cellular in the state of Washington. WITA points out that the numbers that US Cellular reports for the Toledo Telephone Company exchange defy logic and underscore the problems with the billing address concept. Instead of billing address, WITA advocates use of certification that the supported wireless lines are actually in primary use in the area for which the designation has been received. A wireless company would have to certify that at least fifty percent of the originating calls on a wireless service originate in a cell site within the exchange for which the line is designated as a USF supported line.

On the ETC designation process, WITA advocates that a *prime facie* showing be made that the basic services are or will be provided before ETC designation is made. This *prime facie* showing would include use of propagation studies (for wireless companies) to show service capabilities, and description of service plans that would be supported including the extent to which local calling is included in those service plans. In addition, WITA advocates that equal access to interexchange carriers be part of the ETC designation requirements. Further, WITA

advocates that minimum quality of service standards must be met by companies seeking ETC designation.

WITA points that the public interest test contained in 47 USC § 214(e)(2) has been given insufficient attention. The use of the public interest test must be applied more rigorously in the designation of ETCs to give a meaning to the intent of Congress. WITA supports the public interest principals established by OPASTCO in its white paper.

## **INTRODUCTION**

WITA welcomes this opportunity to respond to the call for comment by the Federal-State Joint Board on Universal Service. WITA is a non-profit association whose members are telecommunications companies serving rural and high-cost areas within the state of Washington.<sup>1</sup> Each of WITA's members meets the definition of a rural telephone company contained in 47 U.S.C. §153(37). Each of WITA's members is designated as an eligible telecommunications carrier (ETC) for its service area or areas.

## **STATE OF THE MARKETPLACE AND THE UNIVERSAL SERVICE FUND**

The Joint Board asked for comments on the state of the marketplace and the universal service fund. WITA believes that the white paper published by OPASTCO issued in January, 2003, does an excellent job of setting out the state of the marketplace and the universal service fund. That white paper is entitled "Universal Service in America: A Congressional Mandate at Risk." WITA supports the

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<sup>1</sup> WITA's members are: Asotin Telephone Company, CenturyTel of Washington, Inc., CenturyTel of InterIsland, Inc., CenturyTel of Cowiche, Inc., Ellensburg Telephone Company, Hood Canal Communications, Inland Telephone Company, Kalama Telephone Company, Lewis River Telephone Company, McDaniel Telephone Company, Pend Oreille Telephone Company, Pioneer Telephone Company, The Rainier Group, St. John Co-Operative Telephone and Telegraph Company, Tenino Telephone Company, The Toledo Telephone Co., Inc., Western Wahkiakum County Telephone Company, Whidbey Telephone Company and YCOM Networks, Inc.

analysis of the state of the marketplace and the universal service fund set forth in the OPASTCO white paper.

Another crucial factor in the state of the marketplace, at least in the State of Washington, is that the growth in access lines among the rural companies has flattened out or, in some cases, declined. For example, Ellensburg Telephone Company had 27,205 access lines at the end of 2001. This count declined to 26,731 access lines at the end of 2002. The WITA member companies have not observed a corresponding plateau or decline in population growth in their areas. Although empirical data is not available, logic suggests that the decline is a combination of households using wireless as their second line (or even their only telecommunications source) and the conversion of second lines to DSL.

The import of this change in direction in the growth of access lines is that it places rural telephone companies in an increasingly fragile position as they try to meet universal service obligations and a growing demand for investment to serve a stagnating or even shrinking customer base.

With these observations about the state of the marketplace, WITA will concentrate its comments on two of the issues that the Joint Board asked to be addressed. The

first is the scope of support. The second is the process for designating ETCs.

#### **SCOPE OF SUPPORT**

In Washington state, three carriers have been designated as competitive ETCs in rural telephone company areas: United States Cellular Corporation, RCC Minnesota, Inc., d/b/a Cellular One, and Inland Cellular Telephone Company, d/b/a Inland Cellular. Each of these carriers offers a mobile wireless service, as opposed to a fixed wireless service.

In many cases, WITA member companies are "bedroom communities" for larger business centers. For example, many of WITA's members serve areas outside the Portland-Vancouver or the Seattle-Tacoma-Everett metropolitan areas. What this means is that many of the customers residing in the WITA members' service areas actually work in those larger business centers and use their wireless service in those larger metropolitan areas, rather than for basic telecommunications service in their residential service area. Almost by definition, this makes wireless lines, at best, second lines. If this is coupled with a decrease in second lines from the roll-out of DSL, this suggests an easy answer to the question of scope of support.

It would be easy for WITA to suggest that in the current environment only the primary line, defined as the line with the obligation of carrier of last resort, receive support. However, WITA does not believe that the easy answer is always the best answer.

When this issue was first addressed some years ago, WITA took the position that the administrative difficulties of determining which lines are primary lines and which lines are not, and the reporting games that this might produce were too difficult to overcome. WITA still takes that position.

Examples of the problems that supporting only a primary line creates are easy to come by. For example, if one spouse designates the wireline service as the primary line for support purposes, what is to stop the other spouse from subscribing to wireless service in his or her own name and designating that service as the primary service? How can the Universal Service Administrative Company (USAC) account for wireline and wireless service to the same billing address?

In addition, if the wireless line is designated as the primary line, the wireline company still has a carrier of last resort obligation which the wireless company does not. This means, at least in the State of Washington, that the

wireline company could be forced to serve that location where it is the "secondary" line and not receive universal service support for that high-cost loop.<sup>2</sup>

Yet another issue that is raised by the concept of supporting only the primary line is the consequence to service in rural areas. The obligation under 47 U.S.C. §254 is to be sure that telecommunications services in rural areas are comparable to those services offered in urban areas and are available at comparable rates. If a rural telephone company is receiving twenty dollars per month support for a high-cost loop and second lines are no longer supported, this would result in a pricing differential for the lines. For example, the primary line may be available at fifteen dollars per month, but the second line would be available to a customer at a higher rate of thirty-five dollars per month. Is this comparable service at comparable rates?

In practical terms, not supporting the second line may not result in a decrease in the size of the fund as first imagined. If a second line in a rural telecommunications company's service area must be priced significantly higher than the primary line because there is no universal service

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<sup>2</sup> In Washington, wireline companies have the obligation to serve as carriers of last resort under RCW 80.36.090. Wireless companies are exempt from such requirements under RCW 80.66.010.

support for the second line, then one of two outcomes will occur: (1) Customers will go without second lines; or, (2) Customers will migrate second lines to wireless service to gain the wireless service's broader calling area. Since the rural telecommunications company's costs are largely fixed due to a lack of economies of scope and scale, these costs will be spread over fewer lines. This will drive up the amount of support per line, both for the wireline ETC and the wireless ETC (assuming that support is predicated upon the incumbent wireline company's support per line). It is not clear that removing support from second lines would result in a significant decrease in the size of the fund. It is clear that designating only the primary line for support will create substantial administrative problems.

Instead of concentrating on primary versus secondary lines, WITA's position is that the issue of the Scope of Support should be addressed by focusing on the use of billing address for wireless ETCs. As noted above, many of the areas that WITA's members serve are bedroom communities for larger business centers. A good example is the Toledo, Washington exchange, located just off Interstate 5. Many of the people who reside within the Toledo exchange work in

the Longview-Kelso<sup>3</sup> or Vancouver, Washington area, or the Portland, Oregon area. The mobile cellular service they subscribe to is used while driving up and down Interstate 5 and, perhaps, in their business activities in Portland, Vancouver, or Longview-Kelso.

US Cellular was designated as an ETC for the Toledo exchange and began receiving support in the first quarter of 2001. The following table demonstrates what US Cellular reported as the number of lines served by it within the Toledo exchange service area and the amount of support it received for that area. This is compared to the number of lines that the Toledo Telephone Company reported and the amount of support received for those lines.<sup>4</sup>

|                        | <b>US<br/>Cellular<br/><u>Lines</u></b> | <b>Toledo<br/>Telephone<br/><u>Lines</u></b> | <b>US<br/>Cellular<br/>USF<br/><u>Support</u></b> | <b>Toledo<br/>Telephone<br/><u>USF Support</u></b> |
|------------------------|---|--|---|--|
| <b><u>2001</u></b>     |   |  |   |  |
| <b>1st<br/>Quarter</b> | 1857                                    | 2083   | \$384,360   | \$384,360  |
| <b>2nd<br/>Quarter</b> | 2005                                    | 2085   | \$464,820   | \$395,451  |
| <b>3rd<br/>Quarter</b> | 2245                                    | 2085   | \$513,660   | \$410,625  |
| <b>4th<br/>Quarter</b> | 2245                                    | 2085   | <u>\$513,660</u>                                  | <u>\$421,542</u>                                   |
|                        |   |  | <b>\$1,876,500</b>                                | <b>\$1,611,978</b>                                 |

<sup>3</sup> Longview, Washington, and Kelso, Washington, are separate cities. They are referred to colloquially as the Longview-Kelso area.

<sup>4</sup> All of this data is taken from the information posted to the Universal Service Administrative Company's web site: [www.universalservice.org/overview/filings](http://www.universalservice.org/overview/filings). This information is found on a combination of USAC reports HC01, HC03, and HC04 for the periods referenced.

|                | US<br>Cellular<br><u>Lines</u> | Toledo<br>Telephone<br><u>Lines</u> | US<br>Cellular<br>USF<br><u>Support</u> | Toledo<br>Telephone<br><u>USF Support</u> |
|----------------|--------------------------------|-------------------------------------|---|---|
| <u>2002</u>    |                                |                                     |   |   |
| 1st<br>Quarter | 1735                           | 2115                                | \$482,424                               | \$445,701                                 |
| 2nd<br>Quarter | 2171                           | 2034                                | \$583,305                               | \$427,257                                 |
| 3rd<br>Quarter | 1486                           | 2034                                | \$369,978                               | \$438,849                                 |
| 4th<br>Quarter | 1486                           | 2034                                | <u>\$369,978</u>                        | <u>\$511,547</u>                          |
|                |                                |                                     | \$1,805,685                             | \$1,823,354                               |

There are several observations to be drawn from this data. First, US Cellular immediately received support for 1,857 wireless lines that it had been serving without support just prior to the year 2001. There is a policy question of why USF support is needed for a service customers voluntarily choose to subscribe to without the USF support. How is universal service advanced by the support of existing wireless customers who see no need for such support in making their decision to subscribe to the service?

Beyond this policy consideration, this chart illustrates some of the problems from the use of the billing address. For three of the eight quarters, US Cellular reported more lines than the Toledo Telephone Company reported serving. Since the Toledo area is just

off of Interstate 5, in fact its exchange area includes portions of Interstate 5, there are six wireless companies whose services are available in Toledo. In addition to US Cellular, Sprint PCS, AT&T Wireless, Nextel, Cingular Wireless, and Qwest Wireless all serve the area. As one of six wireless carriers serving the area, US Cellular is somehow able to provide more lines of service than there are physical households served by the wireline company.

This data illustrates that there is something seriously wrong with the use of the billing address as a reporting mechanism. Either that, or Toledo is a unique "hotbed" of wireless service users. Or, US Cellular's sales staff is the most persuasive ever to be assembled. Since the latter two hypotheses are unlikely, this underscores the problems inherent in the use of the billing address as a basis for support.

It should also be noted that Toledo, Washington, used to be primarily a logging town. The surrounding countryside is hilly in nature. Cellular service is not easily deployed nor provided in this difficult to serve area. In fact, there are portions of Toledo's exchange where cellular service, particularly US Cellular service, is marginal or non-existent. Toledo is not an economically vibrant area. The median income for households reporting

earnings in 1999 was \$24,107.<sup>5</sup> The per capita income in 1999 was \$14,483.<sup>6</sup> Approximately fifteen percent of the population has income below the poverty line.<sup>7</sup> Yet apparently over one hundred percent of customers in the Toledo exchange have the money and choose to subscribe to "spotty" wireless service.

Why would customers subscribe to such a service? If the numbers are accurate, the only obvious answer is that they are using the cellular service in areas other than Toledo. Even the fourth quarter 2002 numbers of nearly 1,500 lines for US Cellular suggests that, as one of six wireless carriers, the use of the billing address is problematical. A penetration rate of 73 percent just does not seem feasible for cellular service in a small rural market such as Toledo -- for all six carriers in total, let alone one.

Another aspect about using the billing address is illustrated in the Ellensburg Telephone Company service area. US Cellular does not report any wireless service in the Lauderdale exchange served by Ellensburg Telephone Company. The reason is that there are no billing addresses in the Lauderdale exchange. The only postal service to

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<sup>5</sup> 2000 Census data for City of Toledo, Washington.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

that area is through the use of post office boxes. Since there are no billing addresses, US Cellular cannot report any customers in that area.<sup>8</sup> Those customers of US Cellular who physically reside in the Lauderdale exchange would be reported as customers in the Cle Elum exchange (a Qwest exchange) because that is the post office box billing address.

Rather than billing address, WITA suggests that a test of the primary place of use be adopted. As wireless systems grow more sophisticated, it appears that it may be possible for wireless carriers to identify the place of origin of calls (that is, the cell site in which the call is first initiated). To receive support for wireless service, the wireless company should be required to certify that at least fifty percent of the calls originated on that service originated in a cell site within the exchange for which the line is to be designated as a supported line.

#### **PROCESS FOR DESIGNATING ETCs**

The process for designating ETCs must be improved. In particular, greater attention must be paid to the "public interest" test contained in 47 U.S.C. §102(e)(2).

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<sup>8</sup> It may be that US Cellular does not have any customers in the area. However, if there are customers, it would be impossible for US Cellular to report them based upon a billing address construct.

1. The ETC Process.

The current process for designation of an ETC allows the prospective ETC to simply make a generalized statement that they are able to provide, or will provide, the services that are required to be provided under 47 C.F.R. §54.101. More should be required than a simple statement of intent. A carrier seeking to receive support from this limited federal resource should be able to demonstrate on at least a *prima facie* basis that it offers, or will be able to offer at the time it provides supported service, the requisite services.

If a declaration process is used, it must be supported through detailed information on the capabilities of the prospective ETC to provide the services it says it will provide. This can be done through propagation studies to show that its services reach the area it intends to serve. If it cannot physically reach those areas, then it could provide a copy of an agreement under which it will reach those areas through resale.<sup>9</sup> The potential ETC should be able to describe the number of local calling minutes that are included in the plans that would be supported by ETC

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<sup>9</sup> This assumes that a portion of the area to be served is outside of the signal area of a wireless company and a portion is within. Thus, they would meet the test of providing service in part through their own facilities and in part through resale as required by 47 C.F.R. 54.201(d) (1).

designation.<sup>10</sup> The potential ETC should be able to provide, at a minimum, a narrative description of how its services allow access to operator services, access to interexchange calling, and the other elements of the requisite services.

On the issue of access to long distance calling, WITA's position is that the requirement for an ETC should be to provide equal access. Wireline companies provide equal access. If a wireless carrier desires to receive federal support for its operations as a way of advancing service in rural areas, it should also carry out the federal program of encouraging access to a variety of interexchange companies. In many cases, WITA's members have had to proactively seek long distance companies to serve their areas. A wireless company acting to narrow that gap by providing service only through a limited number of interexchange carriers will make the rural areas less and less desirable for service from a variety of interexchange carriers.

One of the questions asked by the Joint Board was to what extent there is an impact from the Fifth Circuit's decision regarding the Commission's ability to prohibit states from imposing additional eligibility requirements on

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<sup>10</sup> In US Cellular's case, all that was provided is a statement that all of their plans include some element of local usage.

ETCs. The Joint Board's comments cited to Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 418 (5th Circuit 1999) ("TOPUC"). WITA does not see how that decision would have any affect on the FCC encouraging states to have similar standards for the designation of ETCs. Certain core standards can be imposed, recognizing that states have a limited amount of flexibility to impose additional standards. As WITA reads the TOPUC case, it does not give states unlimited or unfettered discretion.

However, along these lines, WITA thinks an additional standard related to service quality is entirely appropriate. WITA suggests that the Joint Board prescribe that states establish a minimum standard for service quality for wireless ETCs. Some states have considered the service quality standard and found it to be appropriate.<sup>11</sup> Certainly, support of services through USF funds should not lead to a degradation of the existing level of service. The goal should be to improve the overall quality of service in rural areas, not to foster competition which results in a degradation of the overall service quality.

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<sup>11</sup> See, e.g., In the Matter of Minnesota Cellular Corporation Petition for Designation as an Eligible Telecommunications Carrier, Minnesota Public Utility Commission, Docket No. P-5695/M-98/1285 (Oct. 27, 1999).

## 2. The Public Interest Test

WITA believes that many state commissions are giving insufficient attention to the public interest test. Some state commissions pay only lip service to the concept of dual goals of advancing universal service and promoting competition. A clear example of this is the decision of the Washington Utilities and Transportation Commission in approving US Cellular as an ETC. While the Washington Commission stated it was giving consideration to both universal service and promoting competition, the following passage shows that the Washington Commission's primary concern was one of promoting competition:

In considering whether USC [US Cellular] should be designated as an ETC, the Commission is mindful that USC now competes with wireline carriers that receive universal service support. The fact that its competitors receive universal service support puts USC at a disadvantage in its ability to make cellular technology more widely available at competitive prices.

While the Commission is also concerned about erosion of universal service support, we view as overly speculative. . . that designating USC as an ETC will result in such erosion. . . Indeed, we believe it advances universal service by increasing affordable access to more types of service.<sup>12</sup>

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<sup>12</sup> United States Cellular Corporation, et al. for Designation as Eligible Telecommunications Carriers, Docket No. UT-970345, Third Supplemental Order Granting Petition For Designation As Eligible Telecommunications Carrier, paragraphs 43 and 46 (Jan. 27, 2000).

The Washington Commission reached this conclusion after having received the petition only slightly more than two weeks prior to its decision.<sup>13</sup> Other than merely stating its predilection, the Washington Commission was not able to point to any aspect of United States Cellular's Petition that would advance universal service, other than that the designation would advance the goal of competition.<sup>14</sup>

There is no evidence that US Cellular tried to make its offering more affordable after receiving designation as an ETC. In fact, the experience in Toledo, as outlined in the table above, suggests the contrary. The number of lines that US Cellular reported for support for the first quarter of 2001 was 1,857. This was predicated on the number of lines it actually believed it had in service in the Toledo area prior to the first quarter of 2001. By the fourth quarter of 2002, this number had decreased to 1,486. If US Cellular was using USF funds to make its offering more affordable, more widely available, and of better

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<sup>13</sup> The Commission issued its written Order several weeks after the date of its oral decision.

<sup>14</sup> The Washington Commission's decision was upheld based upon a due process challenge and whether the Commission's action was arbitrary under the standards for Washington administrative law. Third Supplemental Order Granting Petition for Designation as Eligible Telecommunications Carrier, Docket No. UT-970345 (Washington Jan. 27, 2000), affirmed by WITA, et al. v. WUTC, 65 P.3d 319 (2003), 2003 Wash. LEXIS 208. That decision does not alter the question of what is the appropriate use of the public interest test.

quality, the numbers should, logically, increase rather than decrease.

In fact, it is questionable as to what US Cellular has done with the money it received for the Toledo exchange. By looking at the table set out above, US Cellular has received support of \$3,682,185.00 for 2001 and 2002 for the lines it claims to serve in the Toledo exchange. This is some \$300,000.00 more than what the Toledo Telephone Company itself received. Based on observations by Toledo Telephone Company's employees, which admittedly can be biased, there is no evidence that US Cellular has invested any money in the Toledo exchange to improve its service, bring advanced services to the area, lower its prices, or increase its service capabilities. US Cellular does not employ anyone within the Toledo exchange which would allow the USF support to re-circulate through the economy and contribute to the economic development of the area. If the money is not being reinvested to improve service, is it being used to purchase naming rights to a Chicago baseball stadium?

The OPASTCO white paper sets out seven universal service "public interest" principles that should be used in consideration of ETC applications in rural telephone company service areas:

1. Rural consumers should receive access to affordable, high-quality telecommunications and information services, including advanced services, that are reasonably comparable to those services provided in urban areas and at reasonably comparable rates.
2. The high-cost support mechanisms should not be used to invent uneconomic competition in the areas served by rural telephone companies.
3. The USF is a scarce national resource that must be carefully managed to serve the public interest.
4. Rural universal service support reflects the difference between the cost of serving high-cost rural areas and the rate levels mandated by policymakers.
5. The public interest is served only when the benefits from supporting multiple carriers exceed the costs of supporting multiple networks.
6. In areas where the costs of supporting multiple networks exceed the public benefits from supporting multiple carriers, the public interest dictates providing support to a single carrier

that provides critical telecommunications infrastructure.

7. The cost of market failure in high-cost rural America could be severe.

WITA supports the principles enunciated by OPASTCO. In addition to these principles, it is important that the states (and to the extent the FCC itself makes ETC designations, the FCC) consider the public interest effect on the designation of an ETC for each rural telephone company separately. It is clear that Congress had a concern on a market-by-market basis as to the effect of the designation of a second ETC in rural America. As stated by Senator Dorgan, some rural markets may be able to support designation of a second ETC, some may not:

[T]he protection of universal service is the most important provision in this legislation. S.652 contains provisions that make it clear that universal service must be maintained and that citizens in rural areas deserve the same benefits and access to high quality telecommunications services as everyone else. This legislation also contains provisions that will ensure that competition in rural areas will be deployed carefully and thoughtfully, ensuring that competition benefits consumers rather than hurts them. Under this legislation, the State will retain the authority to control the introduction of competition in rural areas and, with the FCC, retain the responsibility to ensure that competition is promoted in a manner that will advance the availability of high quality telecommunications services in rural areas.

Congressional Record of June 8, 1995, S 7951-2. (Emphasis supplied). Therefore, if a potential ETC seeks designation in several service areas, the regulatory commission that is considering that application needs to consider the effect in each area individually, taking into account the differences among the rural companies. The ability to advance universal service may be different and present different issues in one rural area as compared to another.<sup>15</sup> This is an underlying fundamental principle of the Rural Task Force report which was ultimately adopted by the FCC.<sup>16</sup>

The fact that the public interest test must be given greater consideration by those regulatory commissions making the decision on designation of an ETC is supported by analysis of relevant case law.

Under federal standards, determination of the public interest must be made with reference to the purposes of specific statutory sections to be implemented. See, American Paper Institute v. American Electric Power Service

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<sup>15</sup> This is consistent with the findings of the Rural Task Force that the differences between rural service areas are greater than the differences between rural service areas and non-rural service areas. See, In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Recommended Decision, FCC 00J-4 (Dec. 22, 2000).

<sup>16</sup> See, In the Matter of Federal-State Joint Board on Universal Service Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order of Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 (May 23, 2001).

Corporation, 461 U.S. 402, 103 S. Ct. 1921, 76 L. Ed. 2d. 22 (1983). In American Paper, the Supreme Court found that FERC was required to make its "public interest" determination with respect to the specific objectives of Section 210 of the Public Utility Regulatory Policy act ("PURPA"). The Court did not refer to other sections or general purposes of PURPA. Rather, the Court said in part:

The Commission has a statutory mandate to set a rate that is "in the public interest" and as this Court stated in NAAC v. FPC, 425 US at 669, 96 S. Ct., at 1811, "the words 'public interest' in a regulatory statute ... take meaning from the purposes of the regulatory legislation." The basic purpose of Section 210 of PURPA was to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels.

103 S. Ct. at 1930.

As noted earlier, Senator Dorgan pointed out that "[T]he protection of universal service is the most important provision in this legislation." Congressional Record of June 8, 1995, S 7951. Senator Dorgan was not alone. Senator John F. Kerry of Massachusetts (D-MA) stated:

"The conference report also maintains universal service as a cornerstone of our Nation's communications system."

142 Cong Rec S687, S710.

Senator Ernest Hollings of South Carolina (D-SC) stated:

"The need to protect and advance universal service is one of the fundamental concerns of the conferees in drafting this conference agreement."

142 Cong Rec S687, S688.

Senator J. James Exon of Nebraska (D-NE) stated:

"The farm team, by the way, is a group of rural Senators which pushed a package of rural-oriented reforms during last year's consideration of telecommunications legislation. As a charter member of the farm team along with Senators Bob Kerry, Jay Rockefeller, Byron Dorgan, Ted Stevens, and the current chairman of the commerce Committee Senator Larry Pressler, it is very gratifying that our ideas on universal service, rural markets, regulatory flexibility and preferential rates for schools, libraries and rural health care facilities are now central principles of America's future telecommunications policies."

142 Cong Rec S687, S718.

From these statements, it is clear that universal service must be the focus of consideration in determining ETC designations.

In Alenco Communications, Inc. v. FCC, 201 F.3d 608 (5th Circuit 2000), two telecommunications carriers brought suit against the FCC to enjoin changes to the USF. Alenco, 201 F.3d at 614. These changes involved placing caps on the USF that the carriers felt would limit their rate of return and therefore damage the carriers financially. Alenco, 201 F.3d at 617-18.

In this context, the Fifth Circuit held that:

The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition.

Alenco, 201 F.3d at 615 (emphasis in original). Unlike the balancing between competition and universal service found by the Alenco court to be the intent of Congress, in the designation of ETCs the goal of competition threatens to overrun the goal of universal service.

In United States Telecom Ass'n ("USTA"), et al. v. FCC, 290 F.3d 415 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia rejected the FCC's promotion of "competition for competition's sake."

The Court stated:

In the end, then, the entire argument about expanding competition and investment boils down to the Commission's expression of its belief that in this area more unbundling is better. But Congress did not authorize so open-ended a judgment. It made "impairment" the touchstone.

USTA, 290 F.3d at 425. Applying this same rational to this case, the Court could have just as easily stated that "Congress did not authorize so open-ended a judgment. It made 'public interest' the touchstone."

## CONCLUSION

WITA urges the Joint Board to move forward with recommendations that:

- (1) Do away with the billing address as the basis for customer location for wireless ETCs;
- (2) Include an equal access requirement for access to long distance carriers;
- (3) Include a service quality standard that the states would apply to all ETCs within their jurisdiction;
- (4) Require a *prime facie* showing of the ability to provide the basic services prior to the designation as an ETC (which can include the anticipated ability when service starts, but must be more than just a expression of intent to provide the services); and
- (5) Require a more rigorous application of the public interest test.

Thank you for the opportunity to comment.

Respectfully submitted this 5th day of May, 2003.

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